result has been adopted in many jurisdictions, where, by legislative enactment, a right of action has been expressly created in favor of laborers and materialmen upon the bonds of contractors engaged in the construction of public works—thus suspending the rule as to the necessity of privity between the promisee and the third party.[17] The intent of the legislature to interfere with the common law must be plain;[18] but once this has been established, such statutes should be liberally construed.[19]

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.—The doctrine that an equitable mortgage on land is created by the mere deposit of title deeds as security, arose in England late in the eighteenth century, and has there survived in the face of much hostile criticism and narrow limitation.[1] The severity of the common law mortgage had already led to interference by Chancery to enable the mortgagor to recover his lands by means of the equity of redemption even after the law day.[2] Gradually the jurisdiction of Chancery had been extended until it was the rule that any written instrument, too incomplete or informal to be enforced as a mortgage at law, would be held in equity to impose a lien upon the land, provided the agreement of the parties to pledge such land as security was clearly shown in the instrument.[3] Except for the Statute of Frauds, it seems, therefore, to have been but a single step in advance for Chancery to enforce such a lien where the agreement was evidenced only by the deposit as security of the title deeds to the land, for "* * * although there was no special agreement to assign, the deposit affords a presumption that such was the intent."[4] Nor does it seem unreasonable to infer such intent from the deposit in England, where titles are generally not recorded and the ability of a landowner to make a good title for his successor depends largely upon the possession of an unbroken chain of title deeds.[5] In this country, however, the delivery of deeds does not figure so prominently when real estate is transferred, and although a few State courts have openly adopted the English doctrine, the majority have refused to recognize it.[6]

---

[17]See United States *v.* Jack (1900) 124 Mich. 210; Conn *v.* State (1890) 125 Ind. 514; Mullin *v.* United States (C. C. A. 1901) 109 Fed. 817.

[18]See Lyth *v.* Hingston (N. Y. 1897) 14 App. Div. 11. For a case where the intent to interfere was clearly shown, see Wilson *v.* Whitmore (N. Y. 1895) 92 Hun 466, affd. (1898) 157 N. Y. 693; and for a case where the intent was not clear, see Buffalo Cement Co. *v.* McNaughton (N. Y. 1895) 90 Hun 74, affd. (1898) 156 N. Y. 702.

[19]United States *v.* American Surety Co., *supra.*

[1]See note to Russel *v.* Russel (Lords Commissioners 1783) 18 Eng. Rul. Cas. 26-28.

[2]2 Story, Eq. Jur. (13th ed.) §§ 1004-1015.

[3]Hargrave & Butler's Notes on 3 Co. Lit., note 96.

[4]Reporter's note to Russel *v.* Russel (1783) 1 Brown's Chan. Cas. (2nd ed.) 269.

[5]1 Jones, Mortgages (6th ed.) § 179.

[6]The English doctrine is repudiated in the following cases: Probasco *v.* Johnson (Cincinnati Sup. Ct. 1858) 2 Disn. 96; Meador *v.* Meador (Tenn. 1871) 3 Heisk. 562; Shitz *v.* Dieffenbach (1846) 3 Pa. 233; Gothard *v.* Flynn (1852) 25 Miss. 58; Parker *v.* Carolina Savings Bank (1898) 53 S. C. 583; see Vanmeter *v.* McFaddin (Ky. 1848) 8 B. Monroe 435-437; Bloomfield Bank *v.* Miller (1898) 55 Neb. 243. The other view is taken in the following

The division of authority is excellently illustrated by the recent federal cases of *Grames* v. *Consolidated Timber Co.* (D. C. Ore. 1914) 215 Fed. 785, and *Jennings* v. *Augir* (D. C. Wash. 1914) 215 Fed. 658.[7] Those courts which reject the English doctrine claim that it is hostile to the recording acts and violates the Statute of Frauds.[8]

Such a mortgage, however, is not necessarily repugnant to the spirit of the recording acts. Their object is merely to give notice of encumbrances on title to prospective purchasers,[9] and he who takes a deed after notice of unrecorded encumbrances takes it subject to them.[10] It is only when the enforcement of such an equitable mortgage would result in the subordination of a person who had relied on the record title without notice of the outstanding lien, that the mortgage would conflict with the spirit of the recording acts.[11] As far as these acts are concerned, therefore, there seems little reason why such a mortgage should not be enforced between the immediate parties at least,[12] unless it might be said that since others than prospective purchasers occasionally rely upon records of titles for the purpose of granting credit it would be wiser to refuse to recognize mortgages, if unrecorded, under all circumstances.

But a far greater difficulty is presented by the Statute of Frauds. Indeed, Chancery soon admitted that its new doctrine was irreconcilable with the Statute and Lord Eldon and others followed it only because they considered themselves bound by authority.[13] Consequently, it has been limited narrowly,[14] in sharp contrast to the general tendency of equity to enforce as mortgages all agreements to regard land as security where the intent of the parties can be gleaned from any writing whatsoever.[15] To-day it may properly be argued that the doctrine forms a

---

cases: Griffin *v.* Griffin (1866) 18 N. J. E. 104; Rockwell *v.* Hobby (N. Y. 1844) 2 Sandf. Ch. 10. Occasionally the same result is reached by calling the transaction a trust, First Nat. Bank *v.* Fries (1897) 121 N. C. 241, but this attitude seems erroneous, for by the Statute of Frauds all trusts whose subject matter was land were to be declared in writing, unless constructed by operation of law, and since this relation arises entirely by agreement of the parties it can hardly be called a constructive trust. See 3 Pomeroy Eq. Jur. (3rd ed.) § 1234; *cf.* Hackett *v.* Reynolds (1857) 4 R. I. 512; Davis *v.* Davis (1891) 88 Ga. 191.

[7]The position of the federal courts is uncertain, although two federal cases are often cited as leading authorities in support of the English doctrine. Mandeville *v.* Welch (1820) 5 Wheat. 277, and Nat. Bank *v.* Caldwell (1876) 4 Dill. 314. The former decision, however, merely admits the existence of the doctrine in England and goes no farther, while the latter can hardly be called a square holding either way. For a criticism of this latter case, see Bloomfield Bank *v.* Miller, *supra.*

[8]See note 6, *supra.*

[9]See Thomas, Mortgages (3rd ed.) § 508.

[10]Vanmeter *v.* McFaddin, *supra,* p. 442.

[11]*Cf.* 2 Story, Eq. Jur. (13th ed.) § 1020; but see 3 Pomeroy, Eq. Jur. (3rd ed.) § 1266.

[12]*Cf.* Pomeroy, Eq. Jur. (3rd ed.) § 1266.

[13]See *Ex parte* Haigh (1805) 11 Ves. Jr. *403; Norris *v.* Wilkinson (1806) 12 Ves. Jr. *192.

[14]See *Ex parte* Coming (1803) 9 Ves. Jr. *115; *Ex parte* Finden (1805) 11 Ves. Jr. *404, note a; Norris *v.* Wilkinson (1806), *supra; Ex parte* Coombe (1810) 17 Ves. Jr. *369; *Ex parte* Kensington (1813) 2 V. & B. 79.

[15]See 3 Pomeroy, Eq. Jur. (3rd ed.) §§ 1235-1237; Thomas, Mortgages (3rd ed.) § 46: Sprague *v.* Cockran (1894) 144 N. Y. 104.

recognized exception to the rule of the Statute of Frauds.[16] But it is difficult to explain its adoption at the beginning, except, perhaps, by saying that Chancery deemed it necessary in the interests of justice to evade this Statute as it had evaded the Statute of Uses over a century before.[17]

Many of the American decisions which seem to lean towards the English doctrine are distinguishable upon one ground or another. Some cases will be found to depend not upon the deposit of title deeds alone, but upon the deposit of title deeds together with the presence of some writing indicating that the deposit has been made as security.[18] The written instrument is enough to take these cases out of the Statute of Frauds, and they seem thoroughly sound, provided their doctrine is not extended so as to imperil a purchaser who had relied upon an official record and has had no notice of encumbrances which are unrecorded.[19] The fact that deeds had been deposited seems to have been less important in these cases than the fact that the intent to mortgage was evidenced by some writing,[20] and it would be possible to sustain the decisions solely upon the more general ground that equity will enforce as a mortgage a written instrument which happens to be insufficient at law. Another class of cases which may be supported upon the same ground, comprises those where the instrument deposited as security is a written contract to convey land, and not a title deed in the true sense of the words.[21] The presence of a writing seems to satisfy the Statute of Frauds and ought to be sufficient to give jurisdiction to equity as over an imperfect instrument of mortgage.[22] But it is interesting to note that one court has carried its repudiation of the English doctrine so far as to refuse to recognize any equitable mortgage where deeds had been deposited, even though the transaction was fortified by a writing and notice had been given the adverse claimant.[23]

CONTRACTS OF INSANE PERSONS.—Prior to the adjudication of insanity and the appointment of a guardian or committee, an insane person's contracts or conveyances are, with a few exceptions,[1] held

[16] *Cf.* note 1, *supra.*

[17] *Cf.* Ames, Lectures on Legal History, pp. 243-247; but see Keys *v.* Williams (1838) 3 Y. & C. 55.

[18] Mallory *v.* Mallory (1899) 86 Ill. App. 193; Higgins *v.* Manson (1899) 126 Cal. 467; *In re* Snyder (1908) 138 Ia. 553; *cf.* Mowry *v.* Wood (1860) 12 Wis. 460.

[19] *Cf.* Executors *v.* Trumbull (1865) 50 Pa. 509; Hackett *v.* Watts (1896) 138 Mo. 502; Griffin *v.* Griffin, *supra.*

[20] See Higgins *v.* Manson, *supra; In re* Snyder, *supra.*

[21] Hackett *v.* Watts, *supra; cf.* Bloomfield Bank *v.* Miller, *supra.* Although in the latter case what was actually deposited was a contract to convey, the court treated the situation as if a deposit of deeds had been made and on this theory, repudiated the English doctrine.

[22] See 3 Pomeroy, Eq. Jur. (3rd ed.) § 1266; *cf.* Parker *v.* Carolina Savings Bank, *supra.*

[23] Gardner *v.* McClure (1861) 6 Minn. 250. In this case it is suggested that the deposit of deeds creates a lien upon the paper of the deed itself. *Cf.* Pomeroy, Eq. Jur. (3rd ed.) § 1266.

[1] Executed contracts, in which the sane person acted in ignorance of the insanity of the other party, are generally held binding, if the parties cannot be put in *statu quo.* Ipock *v.* Atlantic etc. R. R. (1912) 158 N. C. 445;